

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

AAK USA RICHMOND CORPORATION

Employer

and

Case 32-RC-217589

**WAREHOUSING, PROCESSING & ALLIED
WORKERS UNION, LOCAL 6, ILWU**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks a self-determination election under the Board's *Armour-Globe*¹ doctrine to determine whether a group of three production supervisors and four laboratory technicians (including one senior laboratory technician) wish to be included in an existing bargaining unit of maintenance and production employees. The Employer disputes the appropriateness of the petitioned-for voting group on the basis that production supervisors are supervisors within the meaning of Section 2(11) of the Act and on the basis that laboratory technicians do not share a community of interest with the employees in the existing bargaining unit.² The Employer further contends that the petition is flawed because the Employer and the Petitioner are parties to a master collective-bargaining agreement which contains a dual-recognition clause.

A hearing officer of the Board conducted a hearing in this matter and the parties submitted post-hearing briefs, which I have duly considered. As explained below, I have concluded that the contractual language regarding dual-recognition does not bar the petition in this matter. Based on the record evidence and relevant Board law, I have further concluded that the Employer has not met its burden of establishing that production supervisors are statutory supervisors, and furthermore, I have concluded that the laboratory technicians are an identifiable, distinct segment of the unrepresented employees and that they share a community of interest with employees in the existing unit. Accordingly, I find that the petitioned-for voting group is appropriate and I am directing an election therein.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer operates an edible vegetable oil manufacturing facility in Richmond, California. The Employer receives bulk raw materials and partially finished vegetable oils and

¹ *Armour & Co.*, 40 NLRB 1333 (1942), and *Globe Machine Stamping Co.*, 3 NLRB 294 (1937).

² The Employer does not dispute that production supervisors share a community of interest with the existing unit; its sole argument against including production supervisors in the petitioned-for voting group is that they are Section 2(11) supervisors.

converts them into finished vegetable oils. The Richmond facility consists of a refinery building, a hydro plant, tank farms, a truck loading area, a railcar transfer area, a laboratory, a maintenance building, a warehouse, and various office buildings.

The highest ranking manager at the Richmond facility is Director of Site Operations Bryant Mangless. Below Mangless are Production Manager Nelson Cornejo and Maintenance and Reliability Manager Chris Stout. About 65 employees, including managers, work at the Richmond facility. About 23 of those employees are included in the following production and maintenance bargaining unit:

All full-time and regular part-time employees performing work in the refinery, warehouse, yard, shed or adjacent lots thereto, including load inspectors, warehouse workers, lift truck operators, drumming operators, hydrogenator operators (aka hydro operators), deodorizer/stripper operators, refinery operators, pumpers, pumper/walking bosses, and journey maintenance employees, employed by the Employer at its facility located at 1145 Harbour Way South, Richmond, CA 94804; excluding office and clerical employees, superintendents who perform no manual work, all other employees, guards, and supervisors as defined in the Act.

The Production Department is headed by Production Manager Cornejo. The Production Department is responsible for offloading raw materials, processing the raw materials and converting them into finished products, and packaging and loading the finished products. Including the three production supervisors, about 22 employees work in the Production Department. With the exception of the three production supervisors, all production employees are members of the existing bargaining unit. The production employees include about 10 operators who work in the refinery plant including three refinery operators, four hydro operators, and three deodorizer/stripper operators. The operators spend most of their time in the refinery building and control rooms, but hydro operators also spend some of their time at the hydro plant. The operators work 24 hours a day on staggered 8-hour shifts. Four pumpers work in the tank farms, in an area between the tank farms known as the "back street," and in the railcar transfer area, with occasional work at the wharf to meet incoming vessels. Pumpers offload bulk fluids, blend fluids, and transfer fluids from one tank to another. Pumpers work 8-hour shifts starting between 5 a.m. and 11 a.m. Two load inspectors work in the back street area. Load inspectors work 8-hour shifts starting between 7 a.m. and 11 a.m. Two warehouse employees/drumming operators work in the drum warehouse on 8-hour shifts starting at 7 a.m. The Production Department also includes one sanitation employee who performs duties throughout the plant.

The Maintenance Department is headed by Maintenance Manager Stout. The Maintenance Department is staffed by four bargaining unit employees who perform preventative maintenance and diagnose and repair malfunctioning equipment. Maintenance employees work throughout the facility, Monday through Friday, on 8-hour shifts starting at 7:30 a.m.

The Quality Department is headed by Quality Assurance and Regulatory Manager Bob Rada. Rada reports to Director Sue Witeof, who works at the Employer's headquarters in

Edison, New Jersey. Reporting to Rada are the three laboratory technicians and one senior laboratory technician whom the Petitioner seeks to add to the bargaining unit. Laboratory technicians analyze samples of inbound raw materials, in-process materials, and finished products to ensure that they conform to specifications. Laboratory technicians work in the laboratory, Monday through Friday, on 8-hour shifts starting at 5 a.m., 6 a.m., 9 a.m., and 2 p.m.

Various other non-unit employees also work at the Richmond facility. Those employees work in functions including sales, finance, customer service, customer innovation, sourcing and trading, supply chain, information technology, and human resources.

II. THE DUAL RECOGNITION LANGUAGE IN THE MASTER AGREEMENT

The Petitioner and the Employer are parties to a master collective-bargaining agreement between the Industrial Employers and Distributors Association and the Northern California Warehouse Council, IBT-ILWU. The agreement is effective by its terms from July 1, 2017, through June 30, 2021. The agreement contains a “Union Recognition” clause which states:

There shall be dual recognition as follow[s]: The Union recognized as the sole collective bargaining agent for all Employees covered by this Agreement will be IBT Local Union 853. Local 6 ILWU shall continue to represent all Employees covered by this agreement for purposes of administering the agreement. Such Employees shall be those employed in the classifications, house by house, covered by former agreements, including supplements and addenda and riders thereto and letters of understanding, between the individual members of the Association and the Union.

IBT Local Union 853 will be recognized as the sole collective bargaining agent for all Employees who are or may become covered by this Agreement pursuant to its adoption by Employers, whose warehouse employees are members of Warehouse Union Local 6, ILWU.

The Employer argues that the language above bars the petition in this matter, notwithstanding that the Petitioner and the Employer are also parties to a separate “Addendum to 2017 Master Agreement” which states, among other things, that “Union Recognition shall be interpreted as recognizing Warehouse Union Local 6, ILWU, as the sole collective bargaining agent for all employees performing work in the refinery, warehouse, yard, shed, or adjacent lots thereto.”

During the hearing, counsel for the Petitioner stated that the language in the Union Recognition clause regarding Teamsters Local 853 (Local 853) was included solely for the purpose of allowing unit employees to participate in the Teamsters pension plan. Consistent with that representation by the Petitioner, counsel for Local 853 furnished a letter to the Hearing Officer dated April 11, 2018, which stated, “While Local 853 and ILWU Local 6 are joint representatives of the unit for purposes of the pension agreement, the Unions have agreed that Local 6 would remain as the representative for all issues related to servicing the unit,” and

further, that “Local 853 unequivocally joins Local 6 in all respects with regard to the appropriateness [of the unit] at issue in the above-referenced case.”³ Counsel for Local 853 also made a brief appearance at the hearing to confirm the above.

Given the plain language of the Addendum entered into by the parties and the unequivocal statements made by Local 853 during the hearing in this matter, there can be no doubt that the Petitioner represents the existing unit employees for purposes of collective bargaining. There is also no question that Local 853 has no competing interest in the existing unit or the petitioned-for employees. I therefore conclude that the dual recognition language in the collective-bargaining agreement does not act as a bar to the petition in this matter, and that the Petitioner is authorized to proceed with its petition.

III. SUPERVISORY STATUS OF PRODUCTION SUPERVISORS

The Burden of Proof and the Board’s Standard for Determining Supervisory Status

Supervisory status under the National Labor Relations Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001).

The burden of establishing supervisory status rests on the party asserting that status. *Id.* Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

The Record Evidence

³ The letter is contained in the record at Board Exhibit 4.

The Employer currently has three production supervisors: Jed Belscher, Luciano Algood, and Devon Webb. Production supervisors report directly to Production Manager Cornejo. Cornejo works Monday through Friday from 7 a.m. to 3:30 p.m., but is available by telephone, text message, and email when he is not at work. Production supervisors work rotating 12-hour shifts starting at 7 a.m. and 7 p.m. Production supervisors perform some of their duties in a control room in the refinery plant and spend the rest of their time on the plant floor troubleshooting any problems that arise with equipment.

Evidence Regarding the Authority to Assign and Responsibly Direct

Supply Chain Manager Paul Sizelove creates a 10-day production plan that maps out the products that will be in production each day, which operations will be running, and the target schedule for production progress each day.⁴ Sizelove gives the production plan to the production supervisors, who in turn use the production plan to prepare run sheets for each operation which are given to the operators. Production supervisors generate run sheets using templates in the Employer's computer system and into which the production supervisors insert the date, the quantity of oil to be used, and the source tank that the oil will be pulled from. Production supervisors also prepare 12-hour production reports, sanitation reports, and safety reports.

Unit employees are assigned to shifts through a bidding process that is based on seniority. A weekly schedule is prepared by Manager Cornejo and posted by the production supervisors. When an employee calls in sick or does not come in to work for any other reason, it is the practice of the production supervisors to request the employees who work the shifts before and after the absent employee to come in early and stay late to cover the missing employee. When wastewater levels in the tanks in the hydro plant get high, production supervisors solicit volunteers to come in and run equipment on the weekends so that the tanks do not overflow. Currently, the hydro operation is the only operation that runs on weekends. Production supervisors solicit volunteers for weekend wastewater coverage without getting prior approval, and fill the shifts on the basis of seniority.

Cornejo testified that production supervisors have the authority to send employees home if they are not following orders and to grant employee requests to leave early, but he did not testify regarding any instances where that had happened. Production supervisor Webb contradicted Cornejo's testimony and stated that he must get authority from Cornejo before he can grant an employee's request to leave early.

Webb testified that if any deviations from the production plan are necessary, such as if, for example, one of the operations falls behind schedule, then the production supervisor must contact Sizelove for direction. The record contains no evidence that production supervisors are held accountable for the performance of production employees.

⁴ No examples of the production plan were introduced into evidence.

On the morning of November 22, 2017, Webb sent an email to Health and Safety Lead Joanna Wenker, Director Mangless, and Production Manager Cornejo to notify them about the discovery of a caustic leak. In that email Webb indicates that he and maintenance employee Al Hines noticed large white splatter stains on the cement and that after checking the area, Webb asked Hines to “go up top to see if there was a leak on the caustic pump.” Hines confirmed the leak, and Webb instructed an operator to turn off the caustic pump until notified otherwise.

On February 26, 2018, Cornejo sent an email requesting production supervisor Algood to provide an update about the status of a cleanup, and Algood responded that he had the “casuals” (probationary employees) shovel up all the hard oil they could and the next day they washed the area down. Algood’s email further indicated that he had spoken with the employee responsible and made sure that he knew his mistake was unacceptable and that if kept happening there was no way he could be kept on. Algood testified that Cornejo had instructed him to have that conversation with the employee.

Evidence Regarding the Authority to Discipline

Manager Cornejo testified that production supervisors are required to draft incident reports whenever there are accidents, mechanical downtimes, or a spill of over five gallons. Production supervisor Webb testified that production supervisors only fill out incident reports when they are directed to do so. The reports include a section entitled “Description of Incident,” a section entitled “Factors Contributing to Incident,” and a section entitled “Recommendations from Investigation.” Email exchanges introduced during the hearing reflect that Cornejo provides guidance about what to include in the incident reports and that Cornejo requests changes to the reports as necessary. For example, in an email dated February 28, 2018, Cornejo directed production supervisor Belscher to prepare an incident report and instructed him that the report had to show “the estimate amounts of oil spilled, reasons and recommendations.” In that same email, Cornejo directed production supervisor Algood to write an incident report about a loose dome in a truck “with all the comments and recommendations,” and Cornejo noted that “it was the dome seal or the inspector missed to put some seals [sic].” Cornejo also directed Webb to send him three reports from the day before “with the changes.” In emails dated February 27 and March 27, 2018, Cornejo directed Webb to add further details to two incident reports that Webb had drafted and resend them to Cornejo.

On February 26, 2018, Webb prepared an incident report involving a large oil spill caused by an improperly positioned gasket on the line of operator Balal Ahmad. Under “recommendations from investigation,” Webb indicates that operators should periodically check their lines throughout their shift. Cornejo testified that after he received Webb’s incident report he sat down with Webb to get more information and Webb recommended that Ahmad should be coached, although Webb specifically denied that he recommended a coaching session with Ahmad. Cornejo also spoke directly with Ahmad about the incident to get his version of what had happened. On March 5, 2018, Cornejo emailed Webb and directed him to sit down with Ahmad and have him sign a “corrective action form” which was attached to the email. Webb testified that the corrective action form, which was labeled as a “coaching/lesson learned,” was prepared by Cornejo. No disciplinary points were assessed to Ahmad.

On February 1, 2018, Webb prepared an incident report regarding an operator error that led to a fire in the facility. Under “Recommendations from Investigation,” Webb stated that “operators should follow procedures at all times” and that operators should be reminded every so often of the potential hazards when using certain chemicals. On March 26, 2018, Webb prepared an incident report for a commingling of oil caused by operator error. Under “Recommendations from Investigation,” Webb states that “when going from one product to the other securing and double checking lines should be the routine.” None of the incident reports produced at the hearing recommend disciplinary action.

Cornejo testified that after he reviewed the March 26, 2018, incident report involving the commingling of oils, he conducted a full interview of the operator, Michael Barrios, and disciplinary action resulted. Cornejo testified that Webb had orally recommended that Barrios be given a written warning, although that recommendation was not documented. Webb contradicted Cornejo’s account, specifically denying that he recommended that Barrios be disciplined or that he was involved in the decision to discipline Barrios in any way. On April 3, 2018, Manager Cornejo issued a “formal written warning” to Barrios, who was assessed two points as a result of the error. There is no dispute that the number of points to be assessed for an incident involving an oil spill or a commingling of oils is not discretionary but is based strictly on the Employer’s disciplinary policy, which was negotiated with the Petitioner.

The record reflects that any time a production employee is late or absent, production supervisors report the incident and any explanation provided by the employee on a form which is given to Manager Cornejo. Production supervisor Webb testified that production supervisors do not have any discretion whether to fill out the form and that if the employee offers an excuse it is up to Cornejo to determine whether to “let the employee off the hook.” There is no evidence that production supervisors recommend whether to issue discipline for attendance issues. By all accounts, attendance discipline is non-discretionary and is dictated by the collective-bargaining agreement.

Evidence Regarding the Authority to Hire, Promote, and Discharge

Production supervisors fill out evaluation forms for probationary employees entitled “Performance Feedback for Probationary Employee.” The forms, which are supposed to be completed after 30, 60, and 90 days, contain fields where the employees are rated on a scale of 1 to 5 for questions related to their work quality, work quantity, job knowledge, attendance, relations with others, and willingness to develop. The form also contains fields for comments where production supervisors make remarks such as “always on time,” “always wearing PPE,” and “does job with little to no help.” The form also asks for comments regarding employee performance, the likelihood that the employee will satisfactorily complete the probationary period, and a recommendation for next steps. Site Operations Director Mangless testified that ultimately, Production Manager Cornejo and the Human Resources Manager make the decision of whether to hire probationary employees. Manager Cornejo testified, however, that he always follows the recommendations of production supervisors regarding whether to retain probationary employees.

In July 2017, production supervisor Webb filled out a performance feedback form for probationary employee Chan Saecho in which Webb noted concerns about Saecho's temperament and confrontations with other employees. Under his recommendation for next steps, Webb indicated "it's probably not going to get any better than this." Saecho was discharged. In December 2017, Webb, Algood, and Belscher filled out performance feedback forms for probationary employee Ryan Takas. Webb noted a lack of care for the job and lack of attention to detail, and under his recommendation for next steps Webb stated, "I know we need people but we should never get so desperate that we keep people with bad work ethics." Algood noted that Takas had below average performance and rushed through tasks. Under his recommendation for next steps Algood stated, "release employee before 90 days and begin search for new load inspector." Belscher noted that Takas works fast but forgets important steps. Under his recommendation for next steps, Belscher stated "we need to move forward and find his replacement ASAP." Takas was discharged. Another probationary employee, Brian Scott, was let go after two of three production supervisors recommended against retaining him. In September 2017, Algood completed a performance feedback form for probationary employee Michael Barrios indicating that he had performed every job to satisfaction and that he has everything needed to perform the probationary period. Barrios was hired on as a permanent employee.

The record also contains testimony regarding instances in which the production supervisors' recommendations regarding probationary employees were not followed. All of the production supervisors recommended the hiring of recent probationary employees Art Banks and Hahn Vo, but Cornejo declined to do so. Cornejo testified that, if he recalled correctly, Vo was not hired because he did not pass a screening test. Cornejo testified that Banks was not hired because he failed a background check. Webb testified that his recommendation to retain probationary employees Terrance Rolland and Ronnie Hillman were also not followed, and that he had heard that Rolland was not hired because he had been in an accident.

Director of Site Operations Mangless testified that production supervisors have participated in interviews and provided feedback for the hiring of the production supervisor and maintenance and reliability manager positions, but he could not provide specific details about their involvement. Mangless further testified that when Algood submitted his application for promotion to the production supervisor position, he provided two recommendation letters from production supervisors who no longer work for the Employer. The record also reflects that production supervisors have participated in interviews for a vacant production supervisor position, which has yet to be filled.

Application of Board Law to the Record Evidence

The Employer contends that its production supervisors exercise the authority to hire, promote, discharge, discipline, assign, and responsibly direct operators in the existing unit, and

to effectively recommend those actions.⁵ As explained below, I find that the Employer has produced insufficient evidence to meet its burden.

Assignment and Responsible Direction

For the purposes of assessing supervisory status under Board law, to “assign” refers to the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare Inc.*, 348 NLRB 686, 689 (2006). The Board has explained that to “assign” refers to the “designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” *Id.* In order to establish “independent judgment” in relation to the authority to assign, the authority to effect an assignment must be independent (free of the control of others), it must involve a judgment (forming an opinion or evaluation by discerning and comparing data), and the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

The Board has defined “responsibly to direct” as: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’... and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 691. The Board explained that direction is “responsible” when the person delegating the task is held accountable for the performance of the task by others and there is the prospect of adverse consequences if the tasks are not performed properly. *Id.* at 692. The Board explained that direction is carried out with “independent judgment” if it is free from the control of others and involves a degree of discretion that rises above the “merely routine or clerical.” *Id.* at 693.

The Employer contends that production supervisors assign work and responsibly direct the work of unit employees using independent judgment by assigning tasks, calling in employees, and scheduling overtime. As explained above, the record reflects that production supervisors request employees to fill in when, for example, an employee calls in sick.⁶

⁵ During the hearing the Employer contended that production supervisors also have the authority to reward employees. The Employer does not make that argument in its brief, however, and has apparently abandoned that position. In any event, while the record reflects that Algood proposed an “employee of the month” program in January 2018, that proposal had not been adopted as of the date of the hearing and there is no other record evidence that production supervisors reward employees.

⁶ The record also contains evidence that on one occasion production supervisor Belscher sent an email to his fellow production supervisors stating that two employees would need to come in early and another employee would need to stay late in order to attend a mandatory meeting. Belscher was filling in for Manager Cornejo at the time because Cornejo was on vacation. Given that Belscher was the acting Production Manager when the email was sent, I conclude that this isolated incident is of no probative value as to Belscher’s supervisory status. The Employer did not establish that production managers fill in for Cornejo on a regular basis.

Production supervisors also request employees to perform occasional weekend work in the hydro plant. There is no evidence, however, that production supervisors can require employees to come in to work on such occasions. Indeed, production manager Webb testified that if no employees agree to come in, then he contacts Manager Cornejo and Production Planner Paul Sizelove, and they figure out what to do. In order to establish the authority to assign, the disputed supervisor must have “the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken.” *Golden Crest Healthcare*, 348 NLRB at 729. Moreover, the record does not establish that production supervisors exercise independent judgment when they ask employees to fill in for an absent employee. Rather, the record shows that production supervisors simply request whichever employees work in the same position before and after the absent employee to work additional hours. The record also does not establish that production supervisors utilize independent judgment when they solicit volunteers to run the wastewater operation on weekends. Webb testified that the only factor that is considered is whether the tank levels are high.

Furthermore, the specific record evidence regarding production supervisors’ assignment of tasks to employees involves only minor tasks. For example, the Employer presented evidence that production supervisor Algood directed probationary employees to shovel up hard oil when a cleanup was necessary. As explained above, however, the Board will not find supervisory status based on instructions that are merely routine, or on “ad hoc instruction that the employee perform a discrete task.” *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006), citing *Oakwood Healthcare*, 348 NLRB at 689. See, e.g., *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995) (assignments which require only the exercise of routine judgment based on experience or ordinary skill do not support a finding of supervisory status). In another example provided by the Employer, production supervisor Webb instructed an operator to shut off a caustic pump until further notice. There is no basis to conclude that Webb’s instruction required the use of independent judgment. Rather, as Webb testified, “It was the only thing to do. It was acid raining down. You gotta shut that off.” Elsewhere, the record establishes that when equipment problems arise at night or on the weekends the production supervisors contact whichever maintenance employee is on call, and if that person is not available, then they call the other mechanics based on seniority. Even assuming that production supervisors could be seen as assigning significant duties to maintenance supervisors on such occasions, the record does not establish that the decision to call in a maintenance employee when there is an equipment breakdown is a decision that requires the use of independent judgment. For the foregoing reasons, I conclude that the record contains insufficient evidence to establish that production supervisors “assign” employees for the purpose of establishing supervisory status.

It is unclear what evidence the Employer relies upon to establish that production supervisors responsibly direct employees since there is no record evidence that production supervisors are held accountable for the work of unit employees. In any case, I find that the record contains insufficient evidence to establish responsible direction.

Authority to Discipline

The Employer contends that while it is rare for any member of management to issue formal disciplinary actions to unit employees, production supervisors nonetheless have the authority to do so. In that regard, the Employer relies on the written coaching that production manager Webb issued to operator Ahmad, and on record evidence that production supervisors track attendance. In the latter scenario, the Employer claims that production supervisors exercise discretion in determining whether to report attendance violations to Cornejo, and therefore, when the decision to report attendance violations are an effective recommendation of discipline. For the reasons discussed below, I disagree.

Turning first to the written coaching of employee Ahmad, the record establishes that Manager Cornejo directed Webb to issue the coaching only after conducting his own investigatory interview of Ahmad. To confer supervisory status, however, the exercise of disciplinary authority must lead to personnel actions without independent investigation or review by management personnel. *G4S Government Solutions, Inc.*, 363 NLRB No. 113 (2016), citing *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); see also *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 3 (2015), enfd. 670 Fed.Appx. 697 (11th Cir. 2016). Furthermore, the record establishes that no points issued as a result of the coaching. The Board has consistently held that reports of employee misconduct or the issuance of minor discipline that does not “alone affect job status or tenure” does not constitute the exercise of supervisory authority under Section 2(11). *Lucky Cab Company*, 360 NLRB No. 43 (2014), citing *Passavant Health Center*, 284 NLRB 887 (1987); *Ken-Crest Services*, 335 NLRB 777, 778 (2001).⁷

Turning next to the reporting of attendance violations, contrary to the Employer’s argument, there is no evidence that production supervisors exercise discretion in determining whether to report attendance infractions to Manager Cornejo. On the contrary, the record reflects that supervisors routinely report any attendance infractions to Cornejo, along with any explanations volunteered by the employee. Even assuming it were true, however, that production supervisors somehow pick and choose which attendance infractions to report (which is not supported by the record), the record contains no evidence regarding what factors production supervisors consider when determining whether to report attendance issues. To exercise independent judgment, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data,” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-693 (2006).

Finally, I conclude that the various incident reports in the record do not evidence supervisory authority because they do not recommend disciplinary action. Where warnings simply bring an employer’s attention to substandard performance or conduct by employees without recommendations for future discipline, the role of those delivering the warnings is

⁷ In its brief, the Employer does not address the written warning that was issued to employee Barrios. In any case, Manager Cornejo’s testimony that Webb recommended the discipline was directly contradicted by Webb, and moreover, the record establishes that Cornejo conducted his own independent investigation before deciding to issue discipline to Barrios.

nothing more than a reporting function, which is not supervisory authority. *Ohio Masonic Home*, 295 NLRB 390, 394 (1989), citing *Passavant Health Center*, 284 NLRB 887, 889 (1987).

Authority to Hire, Promote, and Discharge

The Employer contends that production supervisors effectively recommend whether to promote probationary employees into permanent positions or to discharge the probationary employees, and that the recommendations of production supervisors are almost always followed. The Employer acknowledges that the record reflects instances where the production supervisors' recommendations to hire an employee were not followed, but it contends that those decisions were the result of hiring considerations outside of the evaluation process. Specifically, the Employer contends that one of the probationary employees was not retained because he failed a background check, another because he failed a standard test that is utilized for new hires, and another because he was involved in an accident that caused damage to the Employer's property. The Employer produced no documentation, however, to substantiate its explanations for deviating from the production supervisors' recommendations in any of those instances. Therefore, *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007), relied on by the Employer, is distinguishable. In that case, the Board found front desk supervisors effectively recommended against hiring where the evidence showed that hiring recommendations by front desk supervisors were "very, very key" and that the front desk supervisor's recommendation that a candidate not be hired "would be fatal." Here, by contrast, the record establishes that Manager Cornejo deviates from the hiring recommendations of production employees.

To the extent the Employer contends that supervisory status is conferred based on vague record testimony that production supervisors have participated in interviews or submitted written recommendations regarding the hiring of other production supervisors, the record contains insufficient evidence to make such a finding. "Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015), enfd. 670 Fed.Appx. 697 (11th Cir. 2016); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). In any case, feedback itself is insufficient to establish supervisory authority. See, e.g., *Pacific Coast MS. Industries*, 355 NLRB 1422, 1425-26 (2010).

Secondary Indicia

Finally, the Employer contends that production supervisors must be Section 2(11) supervisors because to hold otherwise would mean that the production employees would have no supervisor whenever Manager Cornejo is not at the facility. The record establishes, however, that production supervisors are routinely in touch with Cornejo by telephone, text message, and email when he is not present at the facility. Furthermore, the Board has consistently held that an employee's service as the highest-ranking employee on duty is a secondary indicium of supervisory status that, by itself, is insufficient to demonstrate supervisory status, and particularly where management is available after hours. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 n.10 (2006). See also *Jochims v. NLRB*, 480 F.3d 1161, 1165, 1173-1174 (D.C. Cir. 2007).

IV. THE STATUS OF LABORATORY TECHNICIANS

The Board's Standard for Determining Appropriate Voting Groups in Self-Determination Elections

When a petitioner seeks to add additional employees to a preexisting bargaining unit, the applicable standard is the Board's *Armour-Globe*⁸ doctrine. Under the *Armour-Globe* doctrine, employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). An incumbent union may petition to add unrepresented employees to its existing unit through an *Armour-Globe* election if the employees sought to be included (1) share a community of interest with unit employees and (2) "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

The Employer contends that the appropriateness of the proposed voting group in this case should be analyzed under *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), which overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), as the standard for determining whether a proposed bargaining unit is appropriate when the employer contends that the smallest appropriate unit must include additional employees. The instant petition, however, does not pose the question of whether a proposed initial bargaining unit must include additional employees in order to be an appropriate unit; it poses the question of whether certain employees may vote to be included in a preexisting bargaining unit. The Board has recognized this distinction, and the Board indicated that *Specialty Healthcare* was not the applicable standard for determining the appropriateness of self-determination elections. See *Republic Services of Southern Nevada*, 365 NLRB No. 145, slip op. at 1, fn. 1 (2017); see also *South Texas Project Nuclear Operating Company Employer*, 2014 WL 5465003 (footnote of Member Johnson finding it inappropriate to apply *Specialty Healthcare* to determine whether a self-determination election is appropriate). Furthermore, the Board in *PCC Structural* did not overrule or even discuss the appropriateness of the longstanding *Warner-Lambert* test in self-determination elections. Accordingly, I conclude that the standard set forth in the Board's decision in *PCC Structural* does not apply here. Rather, the well-established standard in *Warner-Lambert* controls in this *Armour-Globe* context.

The Record Evidence

As explained above, production and maintenance employees work varying 8-hour shifts. They are paid on an hourly basis, approximately \$23 to \$29 per hour, and are eligible for overtime. They record their hours using a timeclock. Unit employees receive medical, dental, pension, and life insurance benefits under the master collective-bargaining agreement. The basic qualifications for production and maintenance employees are a high school education and the ability to operate a forklift. Operators have specific trainings that they attend regarding loading

⁸ *Armour & Co.*, 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

and offloading trucks, loading railcars, confined spaces, and processing oil. All production employees are required to wear safety glasses, steel-toed shoes, and company uniforms. Depending on the operations in which they work, some production employees are also required to wear additional personal protective equipment including face shields, gas masks, and gloves. Operators have lockers in the refinery building. Production and maintenance employees have separate front line supervision by Production Manager Cornejo and Maintenance Manager Stout, but share common management at the upper level by Director of Site Operations Mangless.

Laboratory technicians also work varying 8-hour shifts, are paid on an hourly basis, between \$28 to \$34 per hour, and are eligible for overtime. Laboratory technicians log their hours worked using timesheets. Laboratory technicians are eligible for performance-related bonuses and medical, dental, 401(k), life insurance, and disability benefits, as well as health savings accounts. Laboratory technicians are required to have a bachelor of sciences degree and three to five years' experience in a laboratory environment. They undergo quarterly proficiency testing in which they analyze samples that are sent to them by the American Oil Chemists Society. Laboratory technicians wear optional company uniforms and laboratory coats, and are required to wear safety glasses. Laboratory technicians have a designated break room in the administration building and store their personal items in one of the offices in the lab building. Laboratory technicians receive front line supervision by Quality Assurance Manager Rada and are supervised at the upper level by Director Witeof at the Employer's headquarters.

There are three laboratory technicians and one senior laboratory technician⁹ in the proposed voting group. The basic duties of laboratory technicians are to test samples of vegetable oils in various stages of production, from raw materials to finished products, to determine whether they conform to specifications and to approve or reject the samples based on that analysis. The senior laboratory technician's duties differ in that she spends more time preparing internal reports and has some oversight for maintaining the chemicals and materials in the laboratory. In the performance of their duties, laboratory technicians use equipment including a gas chromatography, an oxidative state analyzer, a solid fat content analyzer, and a machine for running iodine value and peroxide value. Laboratory technicians log the test results into the Employer's inventory information tracking system, known as "ITS." As explained below, laboratory technicians also frequently notify the operators of their tests in person. The laboratory is open Monday through Friday from 5:00 a.m. to 10:30 p.m.

After raw materials have been offloaded to a storage tank and before they begin to be processed, refinery operators take samples of the raw materials to the lab. Refinery operators are required to take samples of in-process material to the laboratory approximately every two hours to test the color, fatty acid levels, and soap level, but they may need to take samples in more frequently if there are any issues with the material. The tests take 5 to 10 minutes, and the results are generally communicated in person to the operators who wait for the results. Refinery operators also have a mini-laboratory in their work area where they can perform limited tests.

⁹ Although the record contains testimony that the senior laboratory technician has some responsibility for overseeing the activities of the other laboratory technicians, there is no contention that the senior laboratory technician is a Sec. 2(11) supervisor.

The mini laboratory was set up for the refinery operators by the laboratory technicians, who provide the testing solutions and glassware for the mini laboratory. In the mini laboratory operators can test soap, fatty acid, and moisture levels. These are quick tests that are not as accurate as those conducted in the laboratory, but are used for estimations to check the progress of in-process materials – e.g., whether the moisture or soap levels are high or low. Senior laboratory technician Rosalin Manalang testified that occasionally if the laboratory technicians are busy then refinery operators will conduct their own tests in the laboratory, which are the same tests that the operators conduct on the in-process materials in their mini laboratory. Manalang testified that this happens approximately twice per day.

Manalang testified that hydro operators spend the most time in the laboratory. Hydro operators conduct their own tests in the laboratory for iodine value and melt point using log sheets provided to them by the laboratory technicians. The tests take 5 to 10 minutes. While the hydro operators are doing this, the laboratory technicians check the run sheets to make sure the samples are meeting the targets. After that has been done, the hydro operators give a sample to the lab technicians who test soap, fatty acid, and moisture levels. Hydro operators also bring finished products from their storage tanks to the lab for evaluation, and those results are entered into ITS by the lab technicians. Manalang testified that hydro operators bring in between 8 to 10 samples per day to evaluate themselves, and about 6 to 8 samples for the laboratory technicians to evaluate.

Deodorizer/stripper operators bring samples to the lab every hour or two, but sometimes as often as every 15 to 30 minutes if they are having problems with their in-process materials. If the lab is busy, the laboratory technicians may split the sample with the deodorizer/stripper operator and the laboratory technician will run the test to check for soap and fatty acid levels and the operator will run filter and moisture tests. The tests take 5 to 10 minutes, and the operators normally wait for their results. Deodorizer/stripper operators also drop off about six to eight finished product samples in the laboratory per day.

Pumpers bring in samples from two to four loads of raw product each a day to be tested for iodine value, which takes about 5 to 10 minutes. Pumpers cannot offload the raw product until they get the lab results. Pumpers also bring in finished product samples from tanks that must be sampled and cleared before they can be released. This is a more complex set of tests including iodine value, melting point, fatty acid levels, peroxide value, moisture, appearance, and flavor. These tests take between 15 to 30 minutes depending on whether hard or soft oils are involved. Once the tests are completed, laboratory technicians enter the results into the ITS and create a certificate of analysis which is given to the truck driver so the load may be released. Manalang testified that there are about 15 trucks of finished product on average per day, but sometimes up to 25 trucks, and the pumpers take a sample to the lab from each of those loads. Pumpers also bring in product samples when they blend oils. After the blend has been completed, the pumpers take a sample of the blend to the laboratory to run the same tests that are run on finished products. The pumpers bring in samples of one to three blends in a day. If the sample has a problem then the laboratory technicians must notify Manager Rada and Production Planner Sizelove. Pumpers also drop off about a dozen filter bags in the laboratory for inspection on a daily basis.

Drumming operators bring samples from source tanks into the laboratory. When those tests are completed, laboratory technicians notify the drumming operators on two-way radios. If something about the sample does not conform to specifications then the laboratory technicians ask the drumming operators for a resample. Drumming operators also bring finished product tests to the lab for analysis. Drumming operators bring about four samples into the laboratory per day.

Laboratory technicians also interact with the sanitation employee on a daily basis when he drops off samples of soapstock for analysis. If the sample passes, then the laboratory technician notifies the scale house that the load is cleared for departure. Finally, laboratory technicians have occasional interactions with maintenance employees when they have equipment problems.

Once a month a laboratory technician engages in “environmental swabbing” in which they test surfaces in various areas of the warehouse and the refinery to determine whether there is any microbial growth. The task takes the laboratory technicians about 2 to 4 hours to complete. Laboratory technicians also maintain a sample retain area in the warehouse directly across from the laboratory building where they go once or twice per day to dispose of samples.

Laboratory technicians take turns attending shift-change meetings with production employees, during which they provide reports on whether railcars are cleared to be loaded or offloaded. The meetings last about 15 minutes. Laboratory technicians and unit employees also attend the same monthly “Town Hall” meetings, which are attended by all employees. The Employer also holds periodic safety trainings that are attended by all employees.

The Application of Board Law to the Record Evidence

Under the first step of *Warner-Lambert*, 298 NLRB at 995, I conclude that the laboratory technicians constitute an identifiable, distinct segment of the Employer’s unrepresented employees. Laboratory technicians are an identifiable, distinct segment of the unrepresented employees because they work in a distinct classification, perform a distinct function, have distinct front-line supervision, and work in a distinct area of the facility. Under the second step of *Warner-Lambert*, I must determine whether the laboratory technicians share a community of interest with employees in the existing unit. For the reasons discussed below, I have concluded that they do.

As explained above, laboratory technicians share both similarities and differences with employees in the existing unit regarding their basic terms and conditions of employment. Like unit employees, laboratory technicians are paid on an hourly basis, work 8-hour shifts, and are eligible for overtime, although they are paid on a higher wage scale. Unit employees and laboratory technicians participate in different fringe benefit plans. Laboratory technicians and unit employees work at the same facility, although they perform their primary duties in different locations at the facility. Laboratory technicians and unit employees wear the same company uniforms, and their use of personal protective equipment varies from one classification to

another. Laboratory technicians record their time on a timesheet while production employees use a timeclock. On the whole, I find shared terms and conditions of employment to be a neutral factor in this case.

Laboratory technicians have different skills, perform different functions, use different equipment, and are required to have different qualifications and training than unit employees. As such, it is no surprise that there is no evidence of permanent transfers or interchange between laboratory technicians and employees in the existing unit. On the other hand many of those differences also exist among employees in the existing unit. Warehouse workers, operators, and the lift truck driver/sanitation employee use different equipment, have different skills, and perform different functions. Furthermore, there is no record evidence of interchange between maintenance and production employees. And while the evidence reflects that there is some overlap in skills to the extent that all production maintenance employees must be able to drive forklifts, it is also true that there is some overlap between the laboratory technicians and unit employees to the extent that operators perform some of their own simple tests on samples of in-process materials. In these circumstances, I do not find that the lack of overlap in skills, training, and functions weighs against allowing the laboratory technicians to be included in the existing unit.

While laboratory technicians have separate front line supervision from the unit employees, the same can be said for employees in the existing unit: production supervisors are supervised by Manager Cornejo and maintenance employees are supervised by Manager Stout. Production and maintenance employees share common facility level supervision by Director Mangless, however, laboratory technicians are managed at the upper level by Director Witeof, who works in a different facility. Accordingly, I find that the factor of common supervision weighs somewhat against including laboratory technicians in the existing bargaining unit.

The record reflects that there is significant work-related contact between laboratory technicians and unit employees on a daily basis. Operators have face-to-face contact with the laboratory technicians numerous times each day when they bring samples to the laboratory, and there is also contact during shift change meetings.

Furthermore, the record establishes significant functional integration between laboratory technicians and the existing unit because the laboratory technicians analyze samples of product at each stage of processing, from receipt of the raw materials to the packaging of the finished product. Indeed, the operators are dependent upon passing test results in order to move the product on to the next step in the production process. The critical connection between the production process and the laboratory is further demonstrated by record evidence that the laboratory technicians set up a "mini-laboratory" in the production area to enable operators to perform their own simple preliminary tests to monitor the progression of their in-process materials.

Weighing the factors above, the terms and conditions of employment and the similarity of employee skills and functions appear to be neutral factors in this case, and the lack of common supervision weighs somewhat against finding a community of interest. On the other hand, there

is regular work related contact and heavy functional integration between laboratory technicians and the existing unit employees. Accordingly, on balance, I find that there is a sufficient community of interest between laboratory technicians and employees in the existing unit to allow the laboratory technicians to be included in the existing bargaining unit, and I conclude that the petitioned-for voting group is appropriate.

V. CONCLUSIONS AND FINDINGS

I have carefully weighed the record evidence and the arguments of the parties, and I conclude that it is appropriate to hold a self-determination election among the employees in the petitioned-for voting group. Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of Section 2(6), (7), and (14) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁰
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute an appropriate voting group for a self-determination election:

All full-time and regular part-time laboratory technicians, senior laboratory technicians, and production supervisors employed by the Employer at its facility located at 1145 Harbour Way South, Richmond, California, 94804, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to

¹⁰ The parties stipulated that the Employer, "a California corporation with an office and place of business located in Richmond, California, is engaged in the business of food manufacturing. During the last twelve months, the Employer has derived gross revenue in excess of \$500,000 and during that same time period, purchased and received goods or services valued in excess of \$5,000, which originated outside the State of California."

be represented for purposes of collective bargaining by WAREHOUSING, PROCESSING & ALLIED WORKERS UNION, LOCAL 6, ILWU.

A. Election Details

The election will be held on May 24, 2018, from 6:30 a.m. to 7:30 a.m., and 1 p.m. to 2 p.m., at the Employer's training room.

B. Voting Eligibility

Eligible to vote are those in the voting group who were employed during the payroll period ending May 12, 2018, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Voting group employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 17, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on

the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents,

enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Oakland, California this 15th day of May 2018.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
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